the court's refusal to assess prospective damages in a single action could be of no benefit to the plaintiff and would be productive of a multiplicity of suits. Although, ordinarily, the plaintiff may bring about the discontinuance of the nuisance by self-help, by securing from the defendant severe exemplary damages for repetitions of the offense,[15] or by injunction, when "the public benefit greatly outweighs private and individual inconvenience,"[16] an injunction will not lie, and courts of law should not attempt to compel the defendant to discontinue the nuisance by assessing exemplary damages. Thus an unconditional injunction will not generally lie against the construction of a railroad,[17] because of the importance of the work to the public and the railroad company's ultimate authority under its charter to purchase all rights necessary to its right of way. In suits at law for damages resulting from such nuisances most courts therefore assess past and future damages in one action.[18] In *Uline* v. *R. R. Co.*,[19] the New York court refused to adopt this course, on the ground that the only legal way for the railroad to purchase rights along its route had been fixed otherwise by a statute. But the practical inconvenience of this technical ruling has been recognized, and has been modified by later decisions.[20]

The fair test of the continuing nature of a nuisance, therefore, seems to be whether or not the nuisance is abatable or would be enjoined.[21] This test was applied in the recent case of *Stein* v. *The C. & O. R. R.* (Ky. 1909) 116 S. W. 733. A railroad company by building its tracks obstructed an abutter's easement of access, and, after he had recovered damages, kept the street out of grade in violation of its statutory duty. Upon suit by his successor in title it was held that the embankment, being necessary to the railroad's existence, was permanent, so that a second judgment for the same cause of action was barred by recovery in a former action. The bad grading of the street, however, being abatable, constituted a continuing nuisance, and recovery for it was therefore not barred by the Statute of Limitations.

THE COMPLETE PERFORMANCE AND THE MUTUALITY DOCTRINES IN THE SPECIFIC PERFORMANCE OF NEGATIVE PROMISES BY INJUNCTION.—If a contract naturally falls within equity's jurisdiction by reason of the inadequacy of legal remedy, though not applied with regularity in all cases, two tests have been established which are of importance in determining whether or not a decree will be granted: complete performance, and mutuality. The substance of the complete performance doctrine, as enunciated in early English cases,[1] is that the court, on the theory that equity does not give a piecemeal remedy, will not assume jurisdiction to enforce specifically the defendant's promise unless it can enforce it in its entirety. This doctrine

[15]Bradley *v.* Amis (N. C. 1806) 2 Hayw. 399.

[16]Burdick, Torts (2nd Ed.) 419.

[17]High, Injunction (2nd Ed.) 598, 637; Cook *v.* R. R. (1872) 46 Ga. 618.

[18]Ridley *v.* R. R. (1896) 118 N. C. 996; Fowle *v.* R. R. (1873) 112 Mass. 334; and see Stein *v.* City of Lafayette (1892) 6 Ind. App. 414.

[19](1886) 101 N. Y. 98.

[20]See Pond *v.* R. R. Co. (1889) 112 N. Y. 186.

[21]See R. R. Co. *v.* King (1900) 23 Ind. App. 573.

[1]Clarke *v.* Price (1819) 2 Wils. Ch. 157; Kemble *v.* Kean (1829) 6 Sim. 333; Kimberly *v.* Jennings (1836) 6 Sim. 340, 352.

is especially applicable when the defendant's promise consists of an affirmative part and a negative part, express or implied.[2] When the negative promise is enforceable by equity's effective remedy of injunction, but the affirmative promise is unenforceable, there exists the added objection found in the notion expressed in the cases that equity should not do indirectly what it cannot do directly. For example, it is intimated in a later English case,[3] that the enforcement of promises for personal services is outside of equity's power and jurisdiction, and the indirect enforcement of such promises by injunction is an extension of jurisdiction of questionable propriety. However, the application of the doctrine of complete performance in both England and this country has been varied and inconsistent. The English cases referred to above[4] which stated the doctrine, were expressly overruled in the celebrated case of *Lumley* v. *Wagner*.[4] The contract in *Lumley* v. *Wagner* was for personal services, and the court enjoined the defendant from singing at any theatre other than the plaintiff's, although it admitted that it could not enforce her affirmative promise to sing for the plaintiff. Although this case is firmly entrenched in the English law, subsequent cases reiterated the doctrine of complete performance, with the added qualification, however, that a part of the defendant's promise would be enforced if it were independent or separable.[5] These cases explained the injunction in *Lumley* v. *Wagner* as an instance of the enforcement of such an independent or separable part. This explanation is not convincing, and is contrary to the description of the promise in the opinion in the case itself.[6] It has been held that the complete performance doctrine does not apply to the ordinary divisible contract.[7] This exception is intelligible and logical. Outside of it, however, it is impossible to determine definitely from the cases just what is a separable and independent part of a promise.[8] But it does appear definitely established that the doctrine of complete performance will not prevent the courts from enforcing a negative promise of the *Lumley* v. *Wagner* type, *i. e.*, a negative expression of the defendant's affirmative promise designed to secure to the promisee the exclusive benefit of the defendant's obligation. The American cases, though less concerned with this doctrine, have reached practically the same results.[9]

Mutuality is of two kinds, a mutuality of remedy and a mutuality of obligation. The rule as to mutuality of remedy has been expressed in this form: "Equity will not compel specific performance by the defendant if,

[2]In England, though in respect to contracts other than for personal services the granting of the injunction depends upon whether the contract in substance reasonably imports a negative, the courts will not at present enforce contracts for personal services by injunction unless the negative is expressed; a condition the American cases do not impose. Metrop. Elec. Supl. Co. *v.* Ginder L. R. [1901] 2 Ch. 709; Whitwood Chem. Co. *v.* Hardman L. R. [1891] 2 Ch. 416; Amer. Assoc. B. C. *v.* Pickett (1890) 8 Pa. C. C. 232; Duff *v.* Russell (1891) 60 N Y. Sup. Ct. 80.

[3]Wolverhampton etc. Co. *v.* London & N. W. Rw. Co. (1873) L. R. 16 Eq. 433, 440.

[4](1852) 1 DeG. M. & G. 604. See also Donnell *v.* Bennett (1883) L. R. 22 Ch. Div. 835. This had also been done in Dietrichsen *v.* Cabburn (1846) 2 Phillips 52.

[5]South Wales Rw. Co. *v.* Wythes (1854) 5 De G. M. & G. 880; Kernott *v.* Potter (1862) De G. F. & J. 445; Merchants' Trading Co. *v.* Banner (1871) L. R. 12 Eq. 18.

[6](1852) 1 De G. M. & G. 617, 618.

[7]Wilkinson *v.* Clements (1872) L. R. 8 Ch. App. 96.

[8]Cf. Dietrichsen *v.* Cabburn, *supra*, with cases in note 5, *supra*.

[9]Ross *v.* Union Pac. Ry. Co. (1863) 1 Woolworth 26; Baldwin *v.* Fletcher (1882) 48 Mich. 604; Daly *v.* Smith (N. Y. 1874) 49 How. Pr. 150. See also 6 COLUMBIA LAW REVIEW 82; 51 Am. Law. Reg. 591.

after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract."[10] Obviously, unilateral conracts[11] and bilateral contracts fully executed on the plaintiff's part,[12] are outside the operation of the principle. However, in cases typified by *Lumley* v. *Wagner,* where the court could not compel the plaintiff to accept the defendant's services and would not restrain him by injunction from discharging his employee,[13] the question of mutuality, though clearly applicable, is not considered. These cases, however, are explained by the fact that if the plaintiff failed to perform the courts would dissolve the injunction.[14] But sometimes the remedy is denied, since it might put the defendant in a disadvantageous position from which the court, in the event of the plaintiff's failure to perform, could not extricate him.[15] Where performance by the plaintiff and defendant are concurrent conditions mutuality is also secured by the conditional decree. But to make this feasible, the contract must be sufficiently simple to permit of a decree easily enforceable.[16]

The idea underlying the doctrine of mutuality of obligation is that equity will not enforce a hard bargain. Although, by the better authority, a mere right in one party to terminate the contract will not, of itself, if the contract is not otherwise inequitable, result in the lack of mutuality,[17] if the freedom of the plaintiff and the restriction of the defendant is such that the contract is manifestly unfair, the courts deny enforcement on the ground that the obligation is not mutual.[18] Another consideration which sometimes deters them from granting injunctions in the case of contracts for personal services, is the idea that the enforcement of such contracts results in a certain degree of servitude.[19] This consideration seems important only when the defendant's negative promise is unduly restrictive.[20]

In a recent case, in the Circuit Court for the Southern District of New York, *Keith* v. *Kellerman* (1909) 41 *Chi. Legal News,* No. 37, the court, applying the doctrine of mutuality of obligation, refused to enjoin the defendant from breaking the summer season stipulation of her engagement to perform exclusively in the plaintiff's theatres, as the plaintiff was under no obligation to give her employment during that season. However, an injunction was granted as to the winter season stipulation of the contract. The case therefore also illustrates the inapplicability of the doctrine of entirety of performance to divisible contracts.

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[10]3 COLUMBIA LAW REVIEW 1, 3. See Pickering *v.* Bishop of Ely (1843) 12 L. J. Ch. 271; Welty *v.* Jacobs (1898) 171 Ill. 624.

[11]Howe *v.* Watson (1901) 179 Mass. 30, 40.

[12]Lane *v.* May & Thomas Hardware Co. (1898) 121 Ala. 296.

[13]Pickering *v.* Bishop of Ely, *supra;* Miller *v.* Warner (N. Y. 1899) 42 App. Div. 208; but see Jones *v.* Williams (1897) 139 Mo. 1.

[14]3 COLUMBIA LAW REVIEW 8.

[15]Peto *v.* The B. U. & T. W. Rw. Co. (1863) 32 L. J. Ch. 677; Stocker *v.* Wedderburn (1857) 3 K. & J. 393.

[16]7 COLUMBIA LAW REVIEW 613, 615.

[17]Singer S. M. Co. *v.* Union B. H. Co. (1873) 22 Fed. Cas. 12904.

[18]Shubert Theatrical Co. *v.* Coyne (1908) 115 N. Y. Supp. 968; Lawrence *v.* Dixey (N. Y. 1907) 119 App. Div. 295.

[19]Clark's Case (1821) 1 Blackf. 122.

[20]Ehrman *v.* Bartholomew (1898) L. R. 1 Ch. 671; Phila. Baseball Club *v.* Hallman (1890) 8 Pa. C. C. 57.